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No. 94-883

In The

Supreme Court of the United States

October Term, 1994

COMMONWEALTH OF VIRGINIA AT THE RELATION
OF THE
STATE CORPORATION COMMISSION,
Plaintiff-Petitioner,

v.

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),
Defendant-Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petition should be granted where the issues presented are inconsistent with the positions asserted by the Petitioner below and where, under state procedural law, the Petitioner was prohibited in the proceeding below from raising the inconsistent issues for the first time in the petition for rehearing.

II. Whether this Court should decline review of this matter where there is no Tenth Amendment issue raised by the Virginia Supreme Court's ruling and where there is no conflict among the United States courts of appeals, a United States court of appeals and a state court of last resort, and the underlying facts are so limited and unique that any decision from this Court would provide little guidance to lower federal courts.

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STATEMENT OF THE CASE

In the Petition For a Writ of Certiorari, Petitioner, the State Corporation Commission of the Commonwealth of Virginia ("Commission"), asserts positions which are totally inconsistent with positions it took before the Virginia Supreme Court and the United States Court of Appeals for the Fourth Circuit. The most notable inconsistency is the Commission's assertion in the Petition that the Virginia Supreme Court should not have decided the issue of whether the Commission is a "court of competent jurisdiction" under the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.* ("Risk Retention Act") (Pet. App. 72a-88a), and that, in deciding the issue, the Virginia Supreme Court violated the Tenth Amendment to the United States

Constitution. The Risk Retention Act's general pre-emption of state law contains an exception permitting a state to seek an injunction from a court of competent jurisdiction. 15 U.S.C. 3902(a)(1)(H). Until the Virginia Supreme Court found that the Commission was not a court of competent jurisdiction, the Commission asserted that the Virginia Supreme Court not only could, but should decide whether the Commission is a court of competent jurisdiction. Further, the Commission took the position that the Federal District Court decision was not binding on the Virginia Supreme Court. The Commission is precluded from taking contradictory positions before this Court in its Petition.

The reason the Commission has abruptly changed its position in the Petition is transparent--it is groping for a constitutional question that it hopes will create a reviewable issue under Rule 10 of the rules of this Court. There are no special or important reasons for this Court to grant the Commission's Petition. The Commission, contrary to its contention in the Petition (Pet. 12 -13), was not impermissibly "forced" by the Virginia Supreme Court to litigate before that Court the question of whether the Commission is a court of competent jurisdiction under the Risk Retention Act. In fact, the Commission urged the Fourth Circuit to hold the parallel federal appeal on this question in abeyance so that the Virginia Supreme Court could decide it. Simply because the Virginia Supreme Court ruled against the Commission, the Commission cannot now justifiably claim that it was improperly forced by the Virginia Supreme Court to litigate the issue.

The Virginia Supreme Court ruled that an agency of the Commonwealth -- the Commission -- is not a court of competent jurisdiction because it is not independent under the unique structure created by Virginia's Constitution and laws. There is no Tenth Amendment question that arises from this finding.

I. Nature of the Case

The Risk Retention Act was enacted by Congress to allow businesses with similar liability risks to form insurance cooperatives called "risk retention groups"("RRGs"). The Risk Retention Act was intended to encourage the formation of RRGs by eliminating the multistate regulation of these entities, leaving primary regulatory authority with the RRGs' "domiciliary state" and prohibiting non–domiciliary states from regulating RRGs except in limited circumstances. Respondent National Home Insurance Company (a Risk Retention Group)("National Home")[1] is an RRG. Its domiciliary state is Colorado. The Risk Retention Act provides that a state's insurance regulator, here the Commission, can only enjoin National Home's operations if it petitions an independent court of competent jurisdiction for an injunction under 15 U.S.C. § 3902(a)(1)(H).

The Commission is vested with regulating insurance in Virginia under *Va. Code* § 38.2-200 (1950, as amended). *Va. Code* § 12.1-16 (1950, as amended) allows the Commission to delegate certain duties and responsibilities to the Commissioner of Insurance. The Commission appoints the Commissioner of Insurance who in turn runs the Bureau of Insurance. The Bureau of Insurance reports to the Commissioner of Insurance. The Commissioner of Insurance reports to the Commission. The Commission reviews the performance of the Commissioner of Insurance and the Bureau of Insurance. The Commission sets the policies followed by the Commissioner of Insurance and the Bureau of Insurance. If the Commission is unhappy with the performance of the Commissioner of Insurance or the staff of the Bureau of Insurance, it simply replaces them. Most importantly, the Commission is the entity that creates policies by

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[1] National Home is 95% owned by Holden Construction Management, Inc. which is 100% owned by Home Buyers Warranty Corp. National Home has no subsidiaries.

legislating and regulating Risk Retention Groups. The Commissioner of Insurance and the Bureau of Insurance have no powers other than those delegated to them by the Commission and all regulatory insurance powers flow through the Commission to its staff.

II. The Proceeding before the Commission

On April 9, 1993, the Office of General Counsel for the Commission, acting in the name of the Commission, petitioned the Commission for an injunction against National Home. Essentially, the Commission's staff petitioned the Commission for an injunction. The initial Motion requested an injunction for ninety (90) days so the Bureau of Insurance could determine whether to seek a permanent injunction.

A hearing was held before the Commission on the Motion for Temporary Injunction on June 29 and 30, 1993. Before the hearing, National Home filed a motion to dismiss and argued, among other things, that the Risk Retention Act prohibited the Commission from issuing an injunction because it was not a court of competent jurisdiction as required by the Risk Retention Act. The Commission rejected these arguments and proceeded with the hearing.

According to its Chairman, the Honorable Theodore V. Morrison, Jr., the Commission held the hearing in its **legislative** capacity:

> CHAIRMAN MORRISON: We're sitting, I guess, fundamentally in our **legislative** function, and the rules regarding hearsay evidence are somewhat relaxed as our **administrative** practice typically allows. We admit some things that are technically hearsay, but we do rule as to their probative value.

(emphasis added). At the conclusion of the legislative hearing, the Commission issued the Injunction Order. (Pet. App. 47a-48a).

The Injunction Order enjoined National Home from issuing any new policies or new certificates or other evidence of coverage in Virginia until National Home restored its surplus to the minimum amount required by National Home's state of domicile, which was determined at the hearing to be $1.2 million. (Pet. App. 47a-48a). Although the Injunction Order allowed for several limited exceptions, it effectively prohibited National Home from writing insurance in Virginia after September 1, 1993, unless National Home met Colorado's minimum capital and surplus requirements.

Because of the irreparable injury caused by the Injunction Order, National Home filed a Petition for Suspension of Effectiveness of Order with the Commission on July 8, 1993, pursuant to *Va. Code.* §§ 12.1–39 and 8.01–676.1 (H). On July 21, 1993, the Commission denied the Petition for Suspension. National Home filed a notice of appeal with the Virginia Supreme Court and, in its subsequent petition for appeal filed on August 2, 1993, it requested suspension of the effectiveness of the Injunction Order.

III. The District Court Proceeding

When National Home filed its petition for appeal of the Injunction Order to the Virginia Supreme Court, the Virginia Supreme Court was just beginning its August recess and the Justices would not be available to rule on the request to suspend the Commission's order until September.

Virginia is National Home's fifth largest market. If National Home was prohibited from doing business in Virginia for any period because of the Injunction Order, National Home would suffer irreparable harm. Consequently, time was of the essence to National Home to be heard on its objections to the Commission's actions prior to the effective date of the Injunction Order of September 1, 1993. In August 1993, the District Court was the only timely source of relief available to National

Home and its affiliate Home Buyers Warranty Corp. ("HBW") to remedy the irreparable harm to National Home and HBW caused by the issuance of the Injunction Order contrary to the mandate of the Risk Retention Act.

National Home and HBW filed a complaint for a declaratory judgment and injunctive relief in the United States District Court for the Eastern District of Virginia on August 2, 1993, requesting a declaration that the Commission was not an independent court of competent jurisdiction as required by the Risk Retention Act and that, therefore, it lacked the authority under the Risk Retention Act to issue the injunction. The Complaint originally named the Commission as a Defendant. It was amended before the filing of responsive pleadings to add the Commissioners as defendants in their individual and official capacities and to add a cause of action arising under 15 U.S.C. § 1983.

The Commission, and subsequently the Commissioners, responded with a motion requesting, *inter alia*, that the District Court abstain from exercising its jurisdiction or, in the alternative, stay the proceeding for an indefinite period. The basis of the Commission's motion was the ongoing proceeding before the Virginia Supreme Court. Notably, the Commission stated: "[a]bstention is appropriate because the exercise of jurisdiction interferes with ongoing state proceedings of substantial importance and interferes with the important and complex state regulatory framework by which Virginia regulates insurance companies conducting business within Virginia."

On August 26, 1993, National Home and HBW filed a Motion for a Temporary Restraining Order and Preliminary Injunction in the District Court case. On August 27, 1993, the District Court heard the first of three oral arguments. The District Court denied the request for a temporary restraining order on September 3, 1993, but set a hearing on the merits and on the motions filed by the Commission and the Commissioners.

The parties submitted several supplemental briefs requested by the District Court on various issues including abstention.

In the Virginia Supreme Court appeal, the petition for suspension of effectiveness of the Commission's order was denied on September 1, 1993. National Home and HBW continued with the proceeding before the District Court as it appeared unlikely at the time that the Virginia Supreme Court would hear and decide the appeal before it for at least a year.

On December 3, 1993, the District Court issued the Memorandum Opinion. (Pet. App. 17a-45a). In its analysis of the phrase "court of competent jurisdiction," the District Court stated:

> Because the Act does not define "court of competent jurisdiction," it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a "state court of competent jurisdiction."

(Pet. App. 34a).

The District Court cited to the legislative history throughout its opinion (*see* Pet. App. 25a-26a), but it did not look to the legislative history of the phrase "court of competent jurisdiction" even though there is legislative history on point which reflects that the phrase refers to an independent judicial officer. The District Court ruled that the Commission could be a court of competent jurisdiction but declined to decide whether the Commission was acting in that capacity when it issued the injunction. (Pet. App. 45a) National Home and HBW appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit.

On January 11, 1994, the Commission filed its opposition to National Home's appeal in the Virginia Supreme Court. (Res. App. F1) The Commission represented to the Virginia Supreme Court that it **was not bound** by the U.S. District Court Decision

and it could rule differently based on the arguments presented by the parties.[2]

Apparently expecting a ruling in its favor from the Virginia Supreme Court, the Commission made an all out attempt to stop the Fourth Circuit litigation so that the Virginia Supreme Court could decide whether the Commission was a "court of competent jurisdiction." The Commission filed a motion asking the Fourth Circuit to abstain, stay the appeal or place the appeal in abeyance because the issues before the Fourth Circuit were identical to the issues before the Virginia Supreme Court. (Res. App. A1-C9). The Commission argued that the Virginia Supreme Court should decide all issues.

Excerpts from the Commission's motion clearly show that the Commission knew the Virginia Supreme Court would be deciding the issue of whether the Commission was a court of competent jurisdiction, and that it wanted the Virginia Supreme Court to decide the issue. The Commission asked the Fourth Circuit to stay its proceeding to give the Virginia Supreme Court a free hand to decide the issue. Specifically, the Commission represented to the Fourth Circuit that:

> 9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction Order because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is

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[2] In its Opposition filed in the Virginia Supreme Court, the Commission stated:

The major issues in this case have already been decided by the United States District Court for the Eastern District of Virginia. **Although that Court's decision is not absolutely binding on this one,** the Commission submits that it is extraordinarily persuasive here. NHIC should bear a heavy burden to explain to this Court why a different result should be reached in this appeal, which burden it has failed to meet. (Emphasis Added)(Res. App. F2)

asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

* * *

21. On January 10, 1994, NHIC filed its Docketing statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; to wit:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.*

* * *

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. **Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.**

* * *

24. This Court should abstain from exercising its jurisdiction because NHIC has failed to exhaust its state remedies inasmuch as it is currently pursuing an appeal from the Injunction to the Supreme Court of Virginia, which appeal is not yet complete. **These pending, concurrent proceedings in Virginia implicate matters of substantial state interest where**

> **NHIC's claim will and should, be resolved.** (emphasis added)(Res. App A3-A6).

The Commission also made the following representations:

> The only conceivable way in which the Virginia Supreme Court can resolve the issue presented in the State Appeal is by determining whether the Commission is a court of competent jurisdiction as required by the Federal Risk Retention Act — the sole and identical issue raised before this Court. **Accordingly, the Virginia Supreme Court's decision will be dispositive of the sole basis of NHIC's Federal Appeal.** (emphasis added)(Res. App C-7).

Acknowledging that the Virginia Supreme Court would be deciding whether the Commission was a court of competent jurisdiction under the Risk Retention Act, the Commission strenuously argued before the Fourth Circuit that the Virginia Supreme Court could and should decide all issues. (Res. App. B6). National Home joined in the Commission's Motion to Abstain. (Res. App. D1-D9). The Fourth Circuit placed the appeal in abeyance to allow the Virginia Supreme Court to decide all issues and ordered that it be informed of any action taken by the Virginia Supreme Court. (Res. App. E1-E2).

IV. The Virginia Supreme Court Appeal

The Virginia Supreme Court heard oral argument on February 23, 1994 on all issues before it, including whether the Commission was a court of competent jurisdiction.

While the matter was on appeal to the Virginia Supreme Court, National Home was able to report to the Commission that it met the minimum surplus and capital requirements of the State of Colorado. The Commission, however, did not lift the injunction and refused three requests by National Home for a hearing. Finally, the Commission lifted its Injunction Order, effective March 31, 1994, in an order dated April 1, 1994.

On June 10, 1994, the Virginia Supreme Court entered an order that the Commission's order was erroneous and accordingly reversed and annulled that order, and dismissed the proceeding with leave for the Commission to bring an action in a court of competent jurisdiction if it be so advised. In the accompanying opinion, the Court, after analyzing state law and the Commission's procedural rules, found:

> The Commission is empowered to regulate insurance in Virginia, Code § 38.2-200, and pursuant to Code § 12.1-16, the Commission delegates certain duties and responsibilities to the Commissioner of Insurance, who is also an employee of the Commission and serves at its pleasure. Here, the Bureau of Insurance, a division of the Commission, sought the injunction. The hearing was conducted by the Commission, and its counsel participated. Moreover, the Commission is a party in this appeal urging an affirmance of its actions and rulings.
>
> In contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided, we believe that, in drafting the Act, Congress intended that there be an institutional separation between the state insurance commissioner and the decisional body considering the insurance commissioner's request for an injunction. Thus, we hold, that for purposes of the Act only, the Commission, as a regulatory tribunal, is neither an"independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress. (Pet. App. 10a-11a).

If the Commission wanted an injunction against National Home, the Virginia Supreme Court stated that it could have petitioned any one of a number of independent state courts with jurisdiction, or federal district courts (Pet. App.11a), which it chose not

to do. Such a court would be the state Circuit Court for the City of Richmond or the United States District Court for the Eastern District of Virginia, several city blocks from the Commission in Richmond.

Following the Virginia Supreme Court's ruling that the Commission was not a court of competent jurisdiction, the Commission filed a petition for rehearing.[3] In this petition, the Commission raised new arguments which contradicted the positions it had previously taken. These new, inconsistent arguments are the sole issues which the Commission has presented in its Petition to this Court. In other words, the Commission realized it had previously failed to raise any novel constitutional or federal issues which could be appealed to this court, so the Commission attempted to overcome this defect in its petition for rehearing. The Virginia Supreme Court denied the petition for rehearing in a one sentence order without any opinion. (Pet. App. 49a).

Once the Virginia Supreme Court ruled on all issues as requested by the Commission, the Fourth Circuit was informed of the decision and the Fourth Circuit remanded the federal appeal to the U.S. District Court with directions to dismiss as moot.[4]

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[3] Under Rule 5:39, Rules of the Supreme Court of Virginia, a petition for rehearing will not be granted unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. National Home did not have the right to file a written opposition to the petition for rehearing; a party only has the right to file an opposition if the petition for rehearing is granted.

[4] National Home requested that the District Court's decision be vacated under the established practice of federal courts in handling civil cases which have become moot on appeal. The proper procedure ". . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. v. Munsingwear*, 340 U.S. 36, 39-40 (1950) and cases cited therein. The Fourth Circuit did not vacate the District Court's decision as required by this established practice.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commission is Estopped from Raising its New and Contradictory Arguments in the Petition under the State Procedural Doctrine of Estoppel by Inconsisent Positions.

Prior to the adverse ruling against it, the Commission never asserted that the Virginia Supreme Court was barred from hearing the appeal because of the District Court decision. Further, the Commission did not assert that the Virginia Supreme Court was prohibited by the Tenth Amendment from deciding that the Commission is not a court of competent jurisdiction. In fact, the Commission asserted just the opposite. The Commission said the District Court decision was not binding and that the Virginia Supreme Court could resolve all issues before it. (Res. App. F2) Under well established precedent of this Court and state law, the Commission is barred from asserting inconsistent positions in its Petition in an effort to create a novel, reviewable issue.

Whether the Commission waived any right it may have had to assert the District Court decision as a bar to the Virginia Supreme Court's consideration of all issues before it is a question of state law. *Leonard v. Vicksburg, Shreveport & Pacific R.R.*, 198 U.S. 416, 422-423 (1905). A state procedural rule which forbids the raising of federal questions at late stages in the case is a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-383 (1955). Virginia's consistent and strict application of the state procedural bar of estoppel by inconsistent positions prevents this Court from reviewing the issues raised by the Commission in the Petition. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128-129 (1945)(state's consistently applied procedural bar prevents review by this Court).[5]

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[5] *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982), a case cited by the Commission, affirms the general rule that questions first raised before the

The Virginia Supreme Court has consistently ruled that a party is estopped from taking inconsistent positions in litigation:

> In Virginia, we have . . . approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one previously assumed, either in the course of litigation for the same cause of action, or in dealings in pais. This wise and salutary policy has been repeatedly followed. *Chesapeake & Ohio Railway Company v. Rison*, 99 Va. 18, 37 S.E. 320; *Canada v. C. H. Beasley & Brothers*, 132 Va. 166, 111 S.E.2; 251, 252; *Arwood v. Hill's Adm'r*, 135 Va. 235, 117 S.E. 603; *Alexander v. Commonwealth*, 137 Va. 477, 120 S.E. 296; *Fitchett v. Parsons*, 142 Va. 163, 128 S.E 457; *Title, etc., Bank v. Clifton Forge National Bank*, 149 Va. 168, 140 S.E. 272; *Nagle v. Syer*, 150 Va. 508, 143 S.E. 690; *Byrd v. Pennsylvania Railroad Company*, 151 Va. 954, 961, 145 S.E. 722."

Leech v. Beasley, 203 Va. 955, 961-962 (1962). "A party cannot either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded; 'a

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state's highest court on a petition for a rehearing are not reviewable by this Court. The decision recognizes an exception where the state procedural rule prohibiting review under such circumstances is inconsistently applied. *Hathorn* involved a case where the petitioners had raised a federal question for the first time in the petition for appeal and, looking at Mississippi law, this Court concluded that the Mississippi Supreme Court does not consistently preclude consideration of issues raised for the first time in a petition for rehearing. In the instant case, the Commission is not just raising new issues, it is taking inconsistent positions by raising those issues. Taking inconsistent positions in the same litigation is something that the Virginia Supreme Court has consistently not permitted.

man shall not be allowed' in the language of the Scotch law' to approbate and reprobate' and where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election if made with knowledge of the facts is in itself binding." *Rohanna v. Vazzana*, 196 Va. 549, 553 (1954). The only reason the Commission has changed its position on collateral estoppel is that the opinion of the Virginia Supreme Court came down against the Commission.

The Commission's current position contradicts the position it took in the Fourth Circuit and the Virginia Supreme Court. Arguably, the Commission could have gone to either court to ask for a stay. It chose to urge the Fourth Circuit to abstain, stay the federal appeal or place the federal appeal in abeyance because the issues before the Fourth Circuit and the Virginia Supreme Court were identical. (Res. App. A3-A6, B5-B6, and C7). The Virginia Supreme Court was informed that the Fourth Circuit had placed the federal appeal in abeyance at the request of the Commission pending the Virginia Supreme Court's decision. Having persuaded the Fourth Circuit not to review the District Court's decision upon the representation that the Virginia Supreme Court's decision would be dispositive of the issue of whether the Commission is a court of competent jurisdiction under the Risk Retention Act, the Commission cannot now complain about the Virginia Supreme Court's ruling on that issue. The Commission's statement (Pet. 12-13) that it was forced by the Virginia Supreme Court to litigate the issue twice is inexplicable. It should not be allowed to rewrite the facts of this case in an effort to create an issue to present to this Court.

National Home would be prejudiced by allowing the Commission to change positions. After the Commission told the Virginia Supreme Court that the District Court decision was not binding, National Home joined in the Commission's motion to the Fourth Circuit to abstain from deciding the federal appeal.

The Fourth Circuit ultimately stayed the appeal because of the pending appeal to the Virginia Supreme Court. Following the Virginia Supreme Court ruling, the Fourth Circuit dismissed the appeal as moot. If the Commission is allowed to change its position on the binding effect of the federal case, National Home would be prejudiced because the federal appeal has been dismissed and National Home can no longer have the merits of the appeal heard by the Fourth Circuit.

The relief requested by National Home below was a ruling that the Commission was not a court of competent jurisdiction. There is no reason why the Commission could not have raised a Tenth Amendment argument **before** the ruling from the Virginia Supreme Court. The Commission invoked the jurisdiction of the Virginia Supreme Court to decide all issues without limitation. The Commission never contended, until after the ruling, that the Virginia Supreme Court was barred by the Tenth Amendment from finding that the Commission is not a court of competent jurisdiction. In an analogous situation where a petitioner had attempted to change positions, this Court stated: "The sound discretion which controls the exercise of the extraordinary powers of the Federal Court...should not permit them to be exerted to relieve suitors...from the very action of state authorities which they have invoked." *United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U.S. 300, 308 (1929)(petitioner challenged statute it had invoked).[6]

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[6] The Virginia Supreme Court's order denying the petition for rehearing does not indicate whether the merits of the new, inconsistent issues raised in that petition were passed upon by the Virginia Supreme Court. Under the Virginia Supreme Court's rule, National Home could not file an opposition to that petition for rehearing, therefore, the merits of the new, inconsistent issues were not fully briefed. This Court restricts its review of federal issues which have not been "pressed or passed upon below." *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1987). The Virginia Supreme Court had an independent basis to deny the petition for rehearing based upon

II. This Case does not Present a Tenth Amendment Issue.

The Commission's new, inconsistent arguments are without merit. The Commission's Tenth Amendment claim that the Virginia Supreme Court's decision imposes" . . .on the States federal requirements in establishing regulatory tribunals in each state" (Pet. 15) is a gross mischaracterization of the decision. Nowhere in the Virginia Supreme Court decision does the Court say that the Risk Retention Act imposes federal requirements in establishing regulatory tribunals in each state. The Virginia Supreme Court decision describes which state tribunals can issue injunctions against an RRG.

The two cases relied upon by the Commission, *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. 2408 (1992) and *Gregory v. Aschcroft*, 501 U.S. 452 (1991) do not support the Commission's argument that the Virginia Supreme Court ruling violated the Tenth Amendment by ruling against the Comission. In *New York v. U.S.*, the Court addressed the Low-Level Radioactive Waste Policy Act of 1985. This Act, in part, required states to either take title to contaminated property or regulate according to the instructions of Congress. This Court found that the Act commandeers the legislative processes of the States by directly proscribing that they enact and enforce a federal regulatory program. *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. at 2428-2429. The Virginia Supreme Court did not find that the Commission was compelled to enact or enforce a federal regulatory program.

In *Gregory v. Aschcroft*, this Court was presented with a suit brought by Missouri state court judges challenging a Missouri state constitution provision requiring that they retire at a certain age. The state court judges claimed that the age provi-

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the doctrine of inconsistent positions. There is no reason in this case to discard this Court's rule that review should be denied where the issue was "not pressed or passed upon below." *Id.*

sion violated the federal Age Discrimination in Employment Act of 1967 ("ADEA"). This Court found that the ADEA was ambiguous as to whether it applied to judges and, in light of such ambiguity and the Tenth Amendment, it ruled that the ADEA did not proscribe regulations for the ages of state court judges.

In *Gregory*, this Court recognized the authority of the states under the Tenth Amendment to establish qualifications of their government officials. *Gregory v. Aschcroft*, 501 U.S. at 460. The Risk Retention Act has nothing to do with the establishment of qualifications of state officials. Moreover, the Virginia Supreme Court's decision does not reflect an interpretation of the Risk Retention Act which establishes qualifications for officials of the Commission. The Virginia Supreme Court ruled that the Commission was not a court of competent jurisdiction as contemplated in the Risk Retention Act and the Commission was preempted from issuing the injunction.

The Risk Retention Act does not attempt to directly regulate the states, it merely preempts contrary state regulations. Congress left the primary responsibility for regulating RRGs with the RRG's state of domicile (domiciliary state") under that state's existing laws. *See* 15 U.S.C. § 3902(a)(1) ("... the jurisdiction in which [a risk retention group] is chartered may regulate the formation and operation of such a group."). The Act expressly exempts risk retention groups from regulation by non-domiciliary states except in certain very limited circumstances. The pre-emption of non-domiciliary state regulation is found in Section 3(a)(1) of the Act which provides:

> [A] risk retention group is **exempt** from any State law, rule, regulation, or **order** to the extent that such law, rule, regulation, or order would ... make unlawful, or **regulate**, directly or indirectly, the operation of a risk retention group **except** that the jurisdiction in which it is chartered may regulate the formation and operation of such a group.

15 U.S.C. § 3902(a)(1) (emphasis added).

In *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. 2408, 2429, this Court found that Congress has the authority to preempt state regulation under the Tenth Amendment:

> The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

By pre-empting state regulation by the Commission, Congress exercised its powers granted under the Constitution and did not violate the Tenth Amendment. The Risk Retention Act tells the states which entities can and cannot issue injunctions against RRG's. It does not proscribe qualifications for officials of state tribunals. The Commission is wrong to characterize this pre-emption as unconstitutional.

CONCLUSION

The Virginia system for regulating insurance is unique. Unlike the entities of other states charged with regulating insurance, the Commission is given certain powers of a court under Virginia's constitution. In this case, this unique body has attempted to regulate a RRG domiciled in Colorado. RRGs constitute only a small percentage of insurance companies. It is unlikely that the issues decided by the Virginia Supreme Court will ever arise in any other state because they have different regulatory structures. This case does not present special and important issues under Rule 10 which would give the Court an opportunity to provide guidance within the federal judicial system on issues where there is a split between United States courts of appeals, a split between a United States court of appeals and a state court of last resort, or an important issue of federal law.

Unlike other cases, the party seeking review has not been harmed. The Virginia Supreme Court ruled that the Commission could seek an injunction from the courts of general jurisdiction in the Commonwealth or that it could go to a United States District Court. There is no harm worthy of this Court's review.

The Commission lifted the injunction in question on April 1, 1994. There is no important or compelling reason for this Court to review the issuance of an injunction which has been dissolved. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 14th day of December, 1994.

Harvey B. Cohen
R. Scott Caulkins
John C. Pasierb
Cohen, Getting, Dunham & Harrison, P.C.
2200 Wilson Boulevard
Arlington, VA 22201
(703) 525-2260
(703)525-2489 (FAX)
Attorneys for Respondent National Home

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 1994, I sent three copies of the foregoing Opposition via first class mail, postage prepaid, to each of the following offices:

Patrick H. Cantilo
Randolph N. Wisener
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 478-6000

Drew S. Days, III
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Counsel of Record for Petitioner

I further certify that all parties required to be served have been served.

/s/_____

Harvey B. Cohen

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA;
THEODORE V. MORRISON, JR.
individually and as Chairman of the State Corporation
Commission of the Commonwealth of Virginia;
PRESTON C. SHANNON, individually
and as a Member of the State Corporation Commission
of the Commonwealth of Virginia;
HULLIHEN W. MOORE, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division

MOTION TO ABSTAIN OR STAY

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (collectively, the "Commissioners"), individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia, by counsel, respectfully submit their Motion to Abstain or Stay in response to the Appeal filed by National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

BACKGROUND

1.NHIC is a risk retention group domiciled in the state of Colorado and operating in the Commonwealth of Virginia pursuant to 15 U.S.C. §§ 3901 *et seq.* (the "Federal Risk Retention Act") and §§ 38.2-5100 *et seq.* of the Code of Virginia (the "Virginia Risk Retention Act").

2. In proceedings in Colorado, where it is domiciled, and before the Commission in Richmond, NHIC has been found to be impaired, insolvent, and/or operating in a hazardous financial condition.

3. Proceedings against NHIC were commenced before the Commission on or about April 9, 1993, by Steven T. Foster, Commissioner of Insurance (the "Commissioner"), in the name of the Bureau of Insurance, of which the Commissioner is in charge. Pursuant to both the Virginia Risk Retention Act and the Federal Risk Retention Act, the Commissioner caused a Motion for Temporary Injunction to be filed seeking an order from the Commission partially enjoining the operation of NHIC in Virginia.

4. After extensive proceedings, and following notice and a hearing, on July 2, 1993, the Commission entered its Order Granting Motion for Temporary Injunction (the "Injunction") partially enjoining the operations of NHIC within the Common-

wealth of Virginia subject to certain qualifications therein set forth. (A true and correct copy of the Order Granting Motion for Temporary Injunction is attached to the Memorandum in Support of this Motion as Exhibit "1," and is incorporated herein by reference.)

5. On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Supreme Court of Virginia (the "State Appeal"). (A true and correct copy of NHIC's Notice of Appeal to the Virginia Supreme Court is attached to the Memorandum in Support of this Motion as Exhibit "2," and is incorporated herein by reference.)

6. On July 30, 1993, NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court.

7. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") in the State Appeal. In connection with the Request for Suspension, the parties briefed extensively the issue of whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

8. Also on August 2, 1993, NHIC filed its Petition for Appeal in the State Appeal.

9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

10. On August 3, 1993, while its State Appeal was pending, NHIC filed a Complaint for Declaratory Judgment (the "Complaint") in the United States District Court of the Eastern District of Virginia, Alexandria Division (the "District Court") seeking

declaratory and injunctive relief against enforcement of the Injunction against NHIC.

11. On August 20, 1993, before the Commission answered the Complaint, NHIC filed its Amended Complaint adding Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as members of the Commission, as defendants.

12. On August 26, 1993, NHIC filed its Motion for Temporary Restraining Order and Preliminary Injunction with the District Court. Following briefing and a hearing before the District Court, the Motion for Temporary Restraining Order was denied.

13. On September 1, 1993, after receiving briefs from both sides, the Virginia Supreme Court denied NHIC's Request for Suspension. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached to the Memorandum in Support of this Motion as Exhibit "3," and is incorporated herein by reference.)

14. The Virginia Supreme Court granted NHIC's Petition for Appeal and entered its order granting the appeal on October 28, 1993.

15. On November 10, 1993, NHIC filed its Assignments of Error with the Virginia Supreme Court raising, among others, the precise issue that it has now raised before this Court. (A true and correct copy of the Assignments of Error is attached hereto as Exhibit "4," and is incorporated herein by reference.)

16. After the submission of numerous additional briefs and several additional hearings before the District Court, Judge Ellis entered his order dismissing NHIC's action on the Amended Complaint on December 3, 1993.

17. On December 12, 1993, NHIC filed its Opening Brief in the State Appeal.

18. On January 11, 1994, the Commission filed its Brief in the State Appeal.

19. The sole issue presented to this Court has been squarely joined in the State Appeal. NHIC has requested oral argument which probably will take place before the Virginia Supreme Court during either its February or March Term.

20. On December 27, 1993, NHIC filed its Notice of Appeal in the District Court (the "Federal Appeal").

21. On January 10, 1994, NHIC filed its Docketing Statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; to wit:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.?*

(A true and correct copy of NHIC's Docketing Statement is attached to the Memorandum in Support of this Motion as Exhibit "4," and is incorporated herein by reference.)

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.

MOTION TO ABSTAIN OR STAY

23. The Commission and the Commissioners hereby incorporate paragraphs 1 through 22, *supra*, as if fully set forth herein.

24. This Court should abstain from exercising its jurisdiction because NHIC has failed to exhaust its state remedies inasmuch as it is currently pursuing an appeal from the Injunction to the Supreme Court of Virginia, which appeal is not yet complete. These pending, concurrent proceedings in Virginia implicate matters of substantial state interest where NHIC's claim will, and should, be resolved.

25. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and its progeny.

26. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny.

27. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) and its progeny.

28. Alternatively, a stay of the Federal Appeal as a matter of comity is warranted under the facts and inherent equitable powers of this Court.

Wherefore, Premises Considered, the Commission and the Commissioners respectfully pray that this Court stay or abstain from adjudicating NHIC's Federal Appeal and for such other relief, legal or equitable, to which they may be justly entitled.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

By Counsel
Cantilo, Maisel & Hubbard, L.L.P.

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins (Va. Bar No. 32834)
111 Congress Avenue, Suite 1700
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(512) 478-6000

Attorneys for Appellees

CERTIFICATE OF CONFERENCE

On January 20, 1994, the undersigned, on behalf of the Commission and the Commissioners, contacted Mr. Harvey Cohen, counsel to NHIC and HBWC, and informed him of the anticipated filing of this Motion to Stay or Abstain. Mr. Cohen stated that he would not consent to the relief sought, and would file a response in opposition to this Motion to Stay or Abstain.

_____

Randolph N. Wisener

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA;
THEODORE V. MORRISON, JR.,
individually and as Chairman of the State Corporation
Commission of the Commonwealth of Virginia;
PRESTON C. SHANNON, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia;
HULLIHEN W. MOORE, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division

MOTION TO PLACE APPEAL IN ABEYANCE

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (collectively, the "Commissioners"), individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia, by counsel, respectfully submit their Motion to Place in Abeyance the Appeal filed by National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

BACKGROUND

1. NHIC is a risk retention group domiciled in the state of Colorado and operating in the Commonwealth of Virginia pursuant to 15 U.S.C. §§ 3901 *et seq.* (the "Federal Risk Retention Act") and §§ 38.2-5100 *et seq.* of the Code of Virginia (the "Virginia Risk Retention Act").

2. In proceedings in Colorado, where it is domiciled, and before the Commission in Richmond, NHIC has been found to be impaired, insolvent, and/or operating in a hazardous financial condition.

3. Proceedings against NHIC were commenced before the Commission on or about April 9, 1993, by Steven T. Foster, Commissioner of Insurance (the "Commissioner"), in the name of the Bureau of Insurance, of which the Commissioner is in charge. Pursuant to both the Virginia Risk Retention Act and the Federal Risk Retention Act, the Commissioner caused a Motion for Temporary Injunction to be filed seeking an order from the Commission partially enjoining the operation of NHIC in Virginia.

4. After extensive proceedings, and following notice and a hearing, on July 2, 1993, the Commission entered its Order Granting Motion for Temporary Injunction (the "Injunction") partially enjoining the operations of NHIC within the Commonwealth of Virginia subject to certain qualifications therein set

forth. (A true and correct copy of the Order Granting Motion for Temporary Injunction is attached to the Memorandum in Support of this Motion as Exhibit "1", and is incorporated herein by reference.)

5. On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Supreme Court of Virginia (the "State Appeal"). (A true and correct copy of NHIC's Notice of Appeal to the Virginia Supreme Court is attached to the Memorandum in Support of this Motion as Exhibit "2", and is incorporated herein by reference.)

6. On July 30, 1993, NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court.

7. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") in the State Appeal. In connection with the Request for Suspension, the parties briefed extensively the issue of whether the Commission is a court of competent jurisdiction for the purposes of the Federal Risk Retention Act.

8. Also on August 2, 1993, NHIC filed its Petition for Appeal in the State Appeal.

9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

10. On August 3, 1993, while the State Appeal was pending, NHIC filed a Complaint for Declaratory Judgment (the "Complaint") in the United States District Court for the Eastern District of Virginia, Alexandria Division (the "District Court"), seeking declaratory and injunctive relief against enforcement of the Commission's Injunction against NHIC.

11. On August 20, 1993, prior to the Commission's having answered the Complaint, NHIC filed its Amended Complaint adding Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as members of the Commission, as defendants.

12. On August 26, 1993, NHIC filed its Motion for Temporary Restraining Order and Preliminary Injunction with the District Court. Following briefing and a hearing before the District Court, the Motion for Temporary Restraining Order was denied.

13. On September 1, 1993, after receiving briefs in opposition and in support of NHIC's Request for Suspension, the Virginia Supreme Court denied the Request for Suspension. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached to the Memorandum in Support of this Motion as Exhibit "4", and is incorporated herein by reference.)

14. The Virginia Supreme Court granted NHIC's Petition for Appeal, entering its order granting the appeal on October 28, 1993.

15. On November 10, 1993, NHIC filed its Assignments of Error with the Virginia Supreme Court raising the precise issue, among others, that it has now raised before this Court. (A true and correct copy of the Assignments of Error is attached hereto as Exhibit "5", and is incorporated herein by reference.)

16. After the submission of numerous additional briefs and additional hearings before the District Court, Judge Ellis entered an order dismissing NHIC's action without prejudice on December 3, 1993.

17. On December 12, 1993, NHIC filed its Opening Brief in the State Appeal.

18. On January 11, 1994, the Commission filed its Brief in the State Appeal.

19. The sole issue presented to this Court has been squarely joined in the State Appeal. NHIC has requested oral argument which will probably take place before the Virginia Supreme Court during either its February or March Term.

20. On December 27, 1993, NHIC filed its Notice of Appeal in the District Court (the "Federal Appeal").

21. On January 10, 1994, NHIC filed its Docketing Statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; namely:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.*?

(A true and correct copy of NHIC's Docketing Statement is attached to the Memorandum in Support of this Motion as Exhibit "6", and is incorporated herein by reference.)

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.

MOTION FOR ABEYANCE

23. The Commission and the Commissioners hereby incorporate paragraphs 1 through 22, *supra*, as if fully set forth herein.

24. Pursuant to Internal Operating Procedure 12.5, the Commission and the Commissioners move this Court to place the Federal Appeal in abeyance while the sole basis of the Federal Appeal, which has been presented to and briefed before the Virginia Supreme Court, may be resolved. The disposition

of this matter by the Virginia Supreme Court will have an effect on the Federal Appeal because NHIC has asked both this Court and the Virginia Supreme Court to determine whether the Commission is a court of competent jurisdiction under the Federal Risk Retention Act.

25. When the Virginia Supreme Court resolves the issue presented to it in the State Appeal, which is the sole basis of NHIC's Federal Appeal, the Commission and the Commissioners will promptly advise this Court pursuant to Internal Operating Procedure 12.5.

WHEREFORE, PREMISES CONSIDERED, the Commission and the Commissioners respectfully pray that this Court hold this Federal Appeal in abeyance until final disposition of the State Appeal by the Virginia Supreme Court and for such other relief, legal or equitable to which they may be justly entitled.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

By Counsel

Cantilo, Maisel & Hubbard, L.L.P.
Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins (Va. Bar No. 32834)
111 Congress Avenue, Suite1700
Austin, Texas 78701
(512)478-6000
Attorney for Appellees

CERTIFICATE OF CONFERENCE

On January 20, 1994, the undersigned, on behalf of the Commission and the Commissioners, contacted Mr. Harvey Cohen, counsel to NHIC and HBWC, and informed him of the anticipated filing of this Motion to Place Appeal in Abeyance. Mr. Cohen stated that he would not consent to the relief sought, and would file a response in opposition to this Motion to Place Appeal in Abeyance.

_____

Randolph N. Wisener

CERTIFICATE OF SERVICE

One copy of the foregoing MOTION TO PLACE APPEAL IN ABEYANCE was served on NHIC and HBWC, through their counsel, Harvey B. Cohen, by overnight delivery, this 20th day of January, 1994, addressed as follows:

Cohen Gettings, Dunham &
Harrison, P.C.
2200 Wilson Blvd., Suite 800
Arlington, Virginia 22101

_____

Randolph N. Wisener

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA; THEODORE V. MORRISON, JR., individually and as Chairman of the State Corporation Commission of the Commonwealth of Virginia; PRESTON C. SHANNON, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia; HULLIHEN W. MOORE, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

Memorandum In Support Of Motion to Place Appeal In Abeyance

CANTILO, MAISEL & HUBBARD, L.L.P.
Patrick H. Cantilo
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MEMORANDUM IN SUPPORT OF MOTION TO PLACE APPEAL IN ABEYANCE

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (the "Commissioners"), by counsel, respectfully submit this Memorandum in Support of their Motion to Place in Abeyance the Appeal of National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

I. NATURE OF THE CASE

This case implicates material questions of federalism and comity because, prior to filing this appeal, NHIC has been pursuing (and continues to pursue) another appeal before the Virginia Supreme Court which is considering, among others, the sole question which is raised before this Court. The appeal before the Virginia Supreme Court is at a well-advanced stage. In its blatant forum shopping, NHIC desires to have this Court provide a stop-gap measure in the event the Virginia Supreme Court decides the very issue presented here adversely to NHIC.

The Commission, as authorized by both state and federal law, entered the injunction against NHIC (the "Injunction") because of NHIC's financially hazardous condition. (A true and correct copy of the Injunction is attached hereto as Exhibit "1", and is incorporated herein by reference.) After noticing an appeal of the Injunction to the Virginia Supreme Court (the "State Appeal"), as well as petitioning to have the effectiveness of the Injunction suspended by the Virginia Supreme Court, NHIC filed an action seeking declaratory and injunctive relief from the Injunction in the United States District Court for the Eastern District of Virginia, Alexandria Division (the "District Court"). On December 3, 1993, the District Court dismissed NHIC's action without prejudice. From this decision by the District Court, NHIC now presents its appeal to this Court (the "Federal Appeal") raising one of the very issues which it has

raised in its State Appeal and which is now being considered by the Virginia Supreme Court. The Commission respectfully requests that this Court place this proceeding in abeyance pending the disposition of the sole question raised here by the Virginia Supreme Court.

II. BACKGROUND

A. The Commission.

The Commission is a department of government of the Commonwealth of Virginia, created and empowered by constitutional and legislative authority. *See* Va. Const. art. IX, §§ 1 and 2; Va. Code §§ 12.1-12 and -13. The Commission is vested with legislative, executive, and judicial powers, and is the means by which the Commonwealth exercises its police power to regulate various industries, including insurance. *See* Va. Code § 38.2-200.

B. NHIC and HBWC.

NHIC is a Colorado corporation conducting the business of insurance in Virginia. HBWC, an affiliate of NHIC, is also a Colorado corporation authorized to do business in Virginia.

C. Prior Proceedings.

1. The Proceedings Before the Commission.

After determining that NHIC was in a hazardous financial condition, the Bureau of Insurance (the "Bureau") instituted an action in the Commission against NHIC. A hearing on the Bureau's request for an injunction was held in Richmond before the Commission for two days in June of 1993, during which the Bureau and NHIC offered and cross-examined witnesses, introduced documentary evidence, and presented and argued various motions.

After considering testimony, evidence, and arguments of counsel, the Commission found NHIC to be financially impaired, and entered the Injunction generally enjoining NHIC

from conducting the business of insurance in Virginia.[1] On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Virginia Supreme Court. (A true and correct copy of NHIC's Notice of Appeal in the state proceedings is attached hereto as Exhibit "2", and is incorporated herein by reference.)

2. The Proceedings Before the District Court.

With its State Appeal pending before the Virginia Supreme Court, NHIC filed an action against the Commission and the Commissioners in the District Court raising the same issues that it had raised in its State Appeal and requested declaratory and injunctive relief which would annul the Injunction. On December 3, 1993, Judge Ellis entered an order dismissing NHIC's action without prejudice. *See National Home Ins. Co. v. State Corp. Comm'n,* No. 93-1006-A 1993 WL 497011 (E.D. Va. Dec. 3, 1993). (A true and correct copy of Judge Ellis's decision is attached hereto as Exhibit "3", and is incorporated herein by reference.) On December 27, 1993 — more than six months after filing its Notice of Appeal to the Virginia Supreme Court — NHIC filed its Notice of Appeal of Judge Ellis's decision to this Court.

3. The Current Duplicative Proceeding Before the Virginia Supreme Court.

As noted earlier, NHIC filed its Notice of Appeal to the Virginia Supreme Court in July of 1993. NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court on July 30, 1993. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") with the Virginia Supreme Court. In connection with the Request for Suspension, NHIC and the

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[1] No relief was sought, and no order entered, against HBWC in the Commission. Indeed, HBWC was not, and is not, a party in the state proceeding. Nonetheless, disposition by the Virginia Supreme Court of the issues pending before it would dispose of all issues presented by HBWC as well.

Commission briefed the issue of whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act. After receiving briefs in opposition and in support of the Request for Suspension, the Virginia Supreme Court denied the Request for Suspension on September 1, 1993. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached hereto as Exhibit "4", and is incorporated herein by reference.)

The sole issue presented to this Court has been squarely joined before the Virginia Supreme Court. On August 2, 1993, NHIC filed its Petition for Appeal in the Virginia Supreme Court. NHIC's petition was granted by the Virginia Supreme Court on October 28, 1993. NHIC filed its Assignments of Error on November 10, 1993. [2] On December 14, 1993, NHIC filed its Opening Brief to the Virginia Supreme Court. On January 11, 1994, the Commission filed its Brief with the Virginia Supreme Court. The precise question raised here was assigned as error by NHIC and briefed by both parties in the State Appeal. NHIC has requested oral argument, and it is anticipated that these arguments will take place before the Virginia Supreme Court during its February or March Term.

III. ARGUMENT

This Appeal Should be Placed in Abeyance Pending Resolution by the Virginia Supreme Court of the Precise Issue now Before this Court.

It is axiomatic that there is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Moreover, it is a well established principle that:

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[2] A true and correct copy of NHIC's Assignments of Error to the Virginia Supreme Court is attached hereto as Exhibit "5", and is incorporated herein by reference.

> a court may, in its discretion, defer or abate proceedings where another suit, involving the identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed.

Blinder, Robinson & Co.. Inc. v. SEC, 692 F.2d 102, 106 (lOth Cir. 1982), *cert. denied*, 471 U.S. 1125 (1985), (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), and *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942)). These time-honored principles are manifested in this Court's Internal Operating Procedure 12.5 which provides that:

> In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal.

In its State Appeal, NHIC has raised the following issue:

> The Commission erred in that it had no jurisdiction to enter the Injunction Order against NHIC under the Federal Risk Retention Act because the Commission is not a "court of competent jurisdiction" within the meaning of the Federal Risk Retention Act.
>
> . . .

Appellant's Assignments of Error (Exhibit "5") at 1-2.

In its Federal Appeal, NHIC presents the following question:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901, *et seq.*

NHIC's Docketing Statement at 2.[3] The only conceivable way in which the Virginia Supreme Court can resolve the issue presented in the State Appeal is by determining whether the Commission is a court of competent jurisdiction as required by the Federal Risk Retention Act — the sole and identical issue raised before this Court. Accordingly, the Virginia Supreme Court's decision will be dispositive of the sole basis of NHIC's Federal Appeal. Naturally, the Virginia Supreme Court's decision will affect the ultimate resolution of the Federal Appeal. A more appropriate candidate for abeyance is difficult to imagine. Consequently, NHIC's Federal Appeal should be placed in abeyance pursuant to this Court's Internal Operating Procedure 12.5.

This Court has held appeals in abeyance on facts which were much less compelling than those presented in the case at bar. *See. e.g., Vincent v. Reynolds Memorial Hospital*, 728 F.2d 250 (4th Cir. 1984) (appeal held in abeyance while West Virginia Supreme Court determined appeal of validity of settlement agreement); *Briley v. Bass*, 750 F.2d 1238, 1240 (4th Cir. 1984) (appeal of district court decision in habeas corpus proceeding remanded and placed in abeyance pending disposition of habeas corpus proceeding in Virginia court).

In the case at bar, an appeal has been perfected and almost completely briefed by the parties in the Virginia Supreme Court. Indeed, the State Appeal was perfected even before the District Court action was ever filed. Thus, the case at bar presents a much more compelling situation for abeyance than did *Vincent* where the state appeal was granted only after the federal court action had been filed. Just as this Court properly refused to waste judicial resources by placing the *Vincent* and *Briley* appeals in abeyance pending resolution by the state court, so should it now

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[3] A true and correct copy of the Docketing Statement filed by NHIC on January 10, 1994, is attached hereto as Exhibit "6'", and is incorporated herein by reference.

refuse to waste judicial resources on this duplicative adjudication.

As this Court has noted:

> [A] federal court is not precluded, in the exercise of its discretion, from staying proceedings in the action before it pending a decision by a state court, with a view to avoiding wasteful duplication of judicial resources and having the benefit of the state court's views.

Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986) (quoting *Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981)). This reasoning from *Giulini*, where the Second Circuit ordered that a claim be held in abeyance until the state court had resolved certain constitutional issues, is equally compelling here. In the case at bar, NHIC has raised precisely the same issue as it has raised, among others, in its State Appeal. Thus, judicial resources would be wastefully duplicated by allowing NHIC's Federal Appeal to proceed concurrently with the State Appeal. The opportunity for contradictory results and piecemeal litigation is great here. Moreover, by placing this matter in abeyance until the Virginia Supreme Court has ruled on the question of whether the Commission is a court of competent jurisdiction, this Court will have the benefit of the state court's views.[4] These factors counsel heavily in favor of placing NHIC's Federal Appeal in abeyance until its State Appeal is resolved.

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[4] Notably, and as pointed out by Judge Ellis, since the Federal Risk Retention Act does not define "'court of competent jurisdiction,'" "it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a " 'state court of competent jurisdiction.' " *National Home Ins. Co. v. State Corp. Comm'n,* No. 93-1006-A 1993 WL 497011 at *7 (E.D. Va. Dec. 3, 1993) (citing *Hill v. Martin*, 296 U.S. 393, 397-98 (1935), and *Roudebush v. Hartke,* 405 U.S. 15, 21 (1972)). Under this settled law, surely no tribunal would be better equipped to make this determination than the Supreme Court of Virginia.

IV. CONCLUSION

NHIC is "hedging its bet" by appealing precisely the same issue simultaneously to this Court and to the Virginia Supreme Court. This Federal Appeal is merely NHIC's safety measure to be used if the Virginia Supreme Court's disposition of the very same issue raised here is unfavorable to NHIC. Such blatant playing of one court system against the other must not be countenanced by this Court. For these compelling reasons, the Federal Appeal should be placed in abeyance pending resolution of the sole basis of this appeal by the Virginia Supreme Court.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

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Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group)
and
HOME BUYERS WARRANTY CORPORATION II,
Plaintiffs-Appellants

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA, et *aL*,
Defendants-Appellees,

Filed: January 28, 1994
District Court No. 93-1006-A

APPELLANTS' JOINDER IN MOTION TO ABSTAIN

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APPELLANT'S JOINDER IN MOTION TO ABSTAIN

National Home Insurance Company (a Risk Retention Group) ("NHIC") and Home Buyers Warranty Corporation II ("HBW"), hereby join in the motion to abstain filed by the State Corporation Commission ("the Commission") and the Commission's individual members, Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (hereinafter, the individual members of the Commission will be collectively referred to as the "Commissioners"), and request that this Court abstain and therefore, that the decision of the District Court be vacated and the case remanded with instructions to await the outcome of the state court proceedings.

SUMMARY OF POSITION

By motion, rather than by cross appeal, the Commission and the Commissioners have resurrected their motion to abstain considered and denied by the District Court. The District Court's decision on abstention was correct at the time it was made, but since then, and since the filing of this appeal, circumstances have changed. Only recently, the Virginia Supreme Court notified counsel that it will hear oral argument on the state appeal during the third week of February 1994. Based on the current status of the Virginia Supreme Court appeal, and the case authority of this Court, the appropriate disposition of the appeal before this Court is to vacate the District Court's opinion and remand the case to the District Court with instructions to retain jurisdiction over the case should anything prevent a prompt state court determination. An explanation of the procedural background reflects the current status of both appeals and the reasons why this relief is now appropriate.

PROCEDURAL HISTORY

NHIC, a "risk retention group" under the Risk Retention Act, 15 U.S.C. § 3901, *et seq.* ("the Federal Act"), writes casualty insurance to insure the product liability risks of builders

in connection with the construction of new residential housing. NHIC is composed of builder members who have joined together to self insure themselves under the Federal Act. The Federal Act was intended to insure uniform regulation of risk retention groups by preempting the authority of non-domiciliary states to exercise regulatory authority over risk retention groups operating in their jurisdictions but domiciled in another state. Colorado is NHIC's domiciliary and regulatory state.

From 1986 until 1992, NHIC employed a well-known, independent actuarial firm to determine and certify the adequacy of its reserves. Insurance rates were based upon this professional advice, and as of September 30, 1992, NHIC's reserves had been certified by the firm to be adequate. Based upon the firm's advice, NHIC had been projecting that by the end of 1992 there would be capital and surplus of $3.5 million to $4 million. During the preparation of the 1991 audited financial statements by an accounting firm engaged by NHIC, the accounting firm's staff actuaries performed their own actuarial analysis and reported that NHIC was under-reserved for unearned premiums under this different analysis. A third actuarial study was conducted by a third independent firm to review those findings. NHIC reported this deficit in unearned premium reserves to the Colorado Division of Insurance.

As a result of this change in actuarial models and the resulting under-reserve, NHIC is operating under the direct supervision of the Colorado Division of Insurance and pursuant to an Abatement Plan. NHIC reported the under-reserve to the Commission.

Even though the Commission can only enjoin NHIC's operations if it petitions an independent court of competent jurisdiction for an injunction under 15 U.S.C. 3902(a)(1)(H), the Bureau of Insurance at the relation of the Commission brought an action before the Commission, with the Commissioners as the triers of fact, against NHIC entitled *Commonwealth of*

Virginia at the Relation of the State Corporation Commission v. National Home Insurance Company (A Risk Retention Group) seeking to enjoin NHIC's operations even though NHIC's domiciliary and primary regulatory state under the Federal Act, Colorado, was allowing NHIC to continue operations under a plan of abatement. On July 2, 1993, the Commission entered an Order granting the Commission's motion for temporary injunction ("Injunction Order"), without a petition being filed or a hearing before an independent court of competent jurisdiction. NHIC's objection to the jurisdiction of the Commission to hear the matter pursuant to the Federal Act was made before the Commission and denied. The Injunction Order was to take effect on September 1, 1993.

Following the issuance of the Injunction Order, NHIC petitioned the Commission to suspend the effectiveness of the Injunction Order and offered to post a bond in the amount of $1 million to cover any claims made on warranties in Virginia. The basis of this motion was the absolute lack of any testimony that NHIC was unable to pay any of its obligations as they became due. In fact, the only testimony was that NHIC could pay claims for the next eight years even if no steps were taken under the plan of abatement. The bond offered by NHIC was in an amount sufficient to pay all claims arising in Virginia for several years even without any further infusion of capital called for in Colorado's Abatement Plan. That petition was denied by the Commission and the Commissioners on July 23, 1993.

Virginia is NHIC's fifth largest market. If NHIC were unable to do business in Virginia for any period of time as a result of the Injunction Order, NHIC would suffer irreparable harm. Consequently, time was of the essence to NHIC to be heard on its objections to the Commission's actions prior to the effective date of the Injunction Order of September 1, 1993. NHIC filed its Notice of Appeal of the Injunction Order on July 6, 1993. In its Petition for Appeal, NHIC petitioned for the

suspension of the effectiveness of the Injunction Order until the Supreme Court decided the appeal. Due to the delay in the Court's consideration of the Petition for Suspension occasioned by the Court's August recess, NHIC and HBW filed a complaint for a declaratory judgment and injunctive relief in the United States District Court on August 2, 1993, requesting that the District Court declare that the Commission was not an independent court of competent jurisdiction as required by the Federal Act and that, therefore, it lacked the authority under the Federal Act to issue the injunction. The Complaint originally named the Commission as a Defendant. It was amended before the filing of responsive pleadings to add the Commissioners as defendants in their individual and official capacities and to add a cause of action arising under 15 U.S.C. § 1983. The District Court was the only timely source of relief available to NHIC and HBW in August 1993 to remedy the irreparable harm to NHIC and HBW caused by the issuance of the Injunction Order contrary to the Federal Act.

The Commission, and subsequently the Commissioners, responded with a motion requesting, *inter alia,* that the District Court abstain from exercising its jurisdiction or, in the alternative, stay the proceeding for an indefinite period of time. The basis of the Commission's motion was the ongoing proceeding before the Virginia Supreme Court.

On August 26, 1993, NHIC and HBW filed a Motion for Temporary Restraining Order and Preliminary Injunction in the District Court case. On August 27, 1993, the District Court heard the first of three oral arguments. The District Court denied the request for a temporary restraining order on September 3. 1993. but set a hearing on the merits and on the motions filed by the Commission and the Commissioners. The parties submitted several supplemental briefs requested by the District Court on various issues including abstention.

In the Supreme Court Appeal, the petition for suspension of effectiveness of order was denied by the Supreme Court of Virginia on September 7, 1993. The Commission delayed transmitting the record to the Virginia Supreme Court, delaying the appeal before that Court. NHIC and HBW continued the proceeding before District Court as it appeared unlikely at that time that the Virginia Supreme Court would hear and decide the appeal before it for at least a year.

On December 3, 1993, the District Court issued the Memorandum Opinion which is the subject of this appeal. The District Court decided not to abstain from ruling on whether the Commission was a court of competent jurisdiction under the Federal Act, but did abstain under *Younger v. Harris,* 401 U.S. 37 (1971) from reviewing the proceeding before the Commission to determine if the Commission was sitting in its legislative or judicial capacity during the proceeding. Because NHIC and HBW believe the District Court erred in ruling that the Commission could act as a court of competent jurisdiction under the Federal Act, NHIC and HBW appealed the District Court's opinion to this Court on December 28, 1993. Neither the Commission nor the Commissioners filed a cross appeal on the District Court's rulings.

After the Commission and Commissioners filed the Motions for Abstention or Abeyance presently before this Court NHIC and HBW received notice from the Virginia Supreme Court tentatively setting oral argument on the appeal pending before it for the week of February 21 through 25, 1994.

ARGUMENT

APPELLANTS JOIN IN THE MOTION TO ABSTAIN FROM HEARING THIS APPEAL AND REQUEST UPON ABSTENTION, THE DISTRICT COURT'S DECISION BE VACATED AND THE CASE BE REMANDED TO THE DISTRICT COURT.

NHIC and HBW believe that the District Court made the correct decision not to abstain below and that issue was not appealed or cross appealed. We recognize, however, that this Court has previously stated that even if the District Court's decision on abstention is not appealed, it can *"ex mero motu"* consider the issue of abstention. *Front Royal and Warren Industrial Park Corp. v. Town of Front Royal, Va.*, 945 F.2d 760, 763 (4th Cir. 1991); *Caleb Stowe Associates, Ltd v. County of Albemarle, Va.*, 724 F.2d 1079, 1080 (4th Cir. 1984); *AFA Distributing Co. Inc., v. Pearl Brewing Co.*, 470 F.2d 1210, 1213 (4th Cir. 1973). *Contra, Winston v. Children and Youth Services of Delaware County*, 948 F.2d 1380, 1384 (3rd Cir. 1991). Accordingly, it is appropriate to consider whether abstention is proper at this time.

We agree that the changed circumstances since the District Court heard this matter now warrant abstention. Five and one half months have passed since the suit was filed. The Virginia Supreme Court has advised all parties that it will hear oral argument during the third week of February 1994 instead of the one year anticipated when the suit was filed before the District Court. Under these circumstances, the length of delay and the resulting irreparable harm to NHIC and HBW appear greatly reduced. Therefore, as a matter of comity and judicial economy, NHIC and HBW agree that abstention would be proper provided that the District Court decision is vacated.

The case law is clear—if this Court abstains, then the decision of the District Court should be vacated. *See Front*

Royal, 945 F.2d at 765; *Caleb*, 724 F.2d at 1081; and *AFA Distributing*, 470 F.2d at 1214. If the lower court decision is not vacated and this Court abstains, then the District Court decision would become final and NHIC and HBW would be deprived of their right of appeal of that decision. On each occasion where this Court has abstained from determining the merits of an appeal of a district court's decision it vacated the judgment below. *Id.*

In addition to vacating the judgment below, it is appropriate for this Court to remand the case to the District Court. In *Caleb,* this court did exactly that:

> Although neither the plaintiffs nor the defendants contend that the case cannot be fully disposed of in Virginia state courts, we think it is appropriate for the district court to retain jurisdiction over the case "should anything prevent a prompt state court determination." *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 31, 79 S.Ct. 1070, 1074, 3 L.Ed.2d 1058 (1959); *Fralin & Waldron, Inc. v. City of Martinsville,* 493 F.2d at 483. In addition, the plaintiffs may wish to preserve their right to have their federal claims decided in federal court in the event of an adverse state determination of the questions of state and local law. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 419-422, 84 S.Ct. 461, 466-468, 11 L.Ed.2d 440 (1964).

724 F.2d at 1080-1081. Here, although the argument is scheduled for the week of February 21-25, 1994, there may be some unforseen delay and the District Court should retain jurisdiction in that event. The District Court noted this possibility when, although entering a final appealable judgment, it stated: "[s]hould delay occur, however, NHIC has leave to return to this Court to pursue its claim." (Memorandum Opinion, p. 33.) If

this Court abstains, the decision below must be vacated and remanded to the District Court.

CONCLUSION

If this Court decides to abstain as a result of the joint motion, it must also vacate the District Court's decision and remand the matter to the District Court with instruction to retain jurisdiction pending the outcome in the state court proceedings.

Respectfully submitted,

COHEN, GEITINGS,
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CERTIFICATE OF SERVICE

I hereby certify that this day of January, 1994, I mailed, first class mail, postage prepaid, a copy of the foregoing to the following offices:

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No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT
(CA-93-1006-A)

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

vs.

STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA; THEODORE V. MORRISON, JR., individually and as Chairman of the State Corporation Commission of the Commonwealth of Virginia; PRESTON C. SHANNON, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia; HULLIHEN W. MOORE, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia,

Defendants - Appellees.

Filed: February 22, 1994

ORDER

Appellees filed a motion to place case in abeyance, appellants filed a response to the motion and appellees filed a reply in support of the motion.

The Court places this case in abeyance pending decision by the Virginia Supreme Court in *National Home Insurance Company v. State Corporation Commission,* record number 931052. The parties are directed to immediately notify this Court in that case.

For the Court

/s/ Bert M. Montague

Clerk

Record No. 931052

IN THE

SUPREME COURT OF VIRGINIA
AT RICHMOND

(S.C.C. Case No. INS930072)

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),

Appellant

v.

STATE CORPORATION COMMISSION,

Appellee.

BRIEF OF APPELLEE STATE CORPORATION COMMISSION

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Solicitor General
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
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Assistant General Counsel
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January 11, 1994

(EXCERPT)

ARGUMENT

The major issues in this case have already been decided by the United States District Court for the Eastern District of Virginia. Although that Court's decision is not absolutely binding on this one, the Commission submits that it is extraordinarily persuasive here. NHIC should bear a heavy burden to explain to this Court why a different result should be reached in this appeal, which burden it has failed to meet.